functional equivalent of paging, but it remains a commercial mobile service under the statute.

Finally, the statute and the legislative history indicate that Congress fully expected many of today's private systems to be reclassified as commercial, [68] but neither the statute nor legislative history provides any clue that Congress expected systems to be classified as private even if they provide for-profit interconnected service to the public.

III. THE COMMISSION SHOULD NOT LIMIT THE USE OF EACH FREQUENCY TO CERTAIN SERVICE CLASSIFICATIONS

The Commission's table of allocations [69] and its service rules [70] currently specify that particular frequencies are allocated either for private or common carrier mobile service. As a result of the reclassification of mobile service providers into private and commercial, however, the Commission will have to engage in extensive rule revisions. Some frequencies should be reserved principally for private mobile services, others should be reserved principally for commercial mobile service, and some frequencies should, perhaps, be equally available for either.

BellSouth does not herein address specifically how the existing allocations should be revised. Nevertheless, BellSouth recommends a general

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[68] *E.g.*, 47 U.S.C. § 332(c)(2), (c)(6); Conference Report at 492, 494-95, 497-98; House Report at 262.

[69] 47 C.F.R. § 2.106.

[70] *See, e.g.*, 47 C.F.R. Parts 22, 80, 87, 90, 95.

approach. In any case, this will require the issuance of further notices of proposed rule making.

The Commission should reexamine the block allocations of spectrum, such as Part 90, to determine whether the public interest still requires designating certain frequencies for the exclusive use of particular classes of eligible users. Some frequencies undoubtedly should be set aside for specialized classes, such as public safety users. Other frequencies might appropriately be shared or pooled among several specialized classes. The remaining frequencies would not be restricted to particular eligible user classes.

This structure would make it unnecessary to earmark particular frequencies for private or commercial use. A given applicant or licensee would be classified on the basis of its actual service, within the constraints on usage of its chosen frequency. Service classification should not determine frequency eligibility. For example, a police department selecting a frequency reserved for internal use in the public safety service would be classified as private. A company using a pooled frequency for providing communications service to eligible users would be either commercial or private, depending on whether the eligible users constitute more than five percent of the service area population.

Although spectrum need not be earmarked for private and commercial use, the Commission cannot avoid distinguishing between private and commercial

applicants. [71] Applicants must specify whether they will offer service as commercial providers to facilitate proper processing. [72]

There is no statutory obstacle to a commercial licensee using its facilities to provide a private mobile service. Indeed, the statute contemplates that a commercial mobile service provider may also provide non-common carrier service:

> A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier. . . . [73]

Unless the Commission determines that the public interest would be disserved by a commercial licensee also providing private service, a commercial licensee should be permitted to provide both commercial and private services over its licensed facilities, without the need for further application.

Applying these principles to PCS, the Commission should classify all PCS licensees as commercial mobile service providers. The definition adopted for PCS calls for providing "services to individuals and businesses and can be integrated with a variety of competing networks." [74] There are no restrictions on

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[71] The Communications Act requires that all major common carrier applications be placed on public notice, potentially subject to petitions to deny. 47 U.S.C. § 309(b), (d). A licensee whose applications have not undergone this process may not lawfully provide service as a common carrier. Since a commercial mobile service provider is deemed a common carrier, all applications proposing commercial operation must be placed on public notice.

[72] In addition, the Communications Act establishes different fees for common carriers and private licensees. 47 U.S.C. § 158. A company that has paid only the lower fee for licensing as a private mobile service operator cannot be authorized to provide commercial service.

[73] 47 U.S.C. § 332(c)(1)(A) (as amended).

[74] 47 C.F.R. § 99.5 (as adopted in *New Personal Communications Services*, GEN Docket 90-314, *Second Report and Order*, FCC 93-451 (Oct. 22, 1993)).

eligible users. Thus, if PCS is offered for profit, it falls squarely within the statutory definition of commercial mobile service. Accordingly, as discussed in the preceding paragraph, a PCS licensee should generally be free to provide private service without further application or authorization.

IV. ALL COMMERCIAL MOBILE SERVICE PROVIDERS SHOULD BE TREATED ALIKE TO CREATE THE REGULATORY PARITY MANDATED BY CONGRESS

Given the overarching statutory goal of creating regulatory parity, BellSouth submits that all commercial mobile service providers should be subject to the same regulatory treatment. All commercial mobile service providers must be treated as common carriers. [75] Except in extraordinary and compelling circumstances, the Commission should refrain from creating classes of commercial mobile service providers subject to different regulatory treatment. Creating such classes will lead to many of the problems associated with the private versus common carrier classification which Congress sought to eliminate.

A. The Competitive Nature of Commercial Mobile Service Removes the Need for Extensive Commission Regulation

The commercial mobile service marketplace ultimately will be very competitive. [76] Whether the service involves two-way voice or paging, no carrier has market power in the provision of any commercial mobile service. PCS, for example, "will be subject to substantial competition, both from other PCS services . . . and from the wide range of radio-based services currently offered: cellular

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[75] Conference Report at 491.

[76] *NPRM* at ¶ 62.

services, specialized mobile radio services, paging services," *etc.* [77] Creating separate regulatory classifications within commercial mobile service will create numerous problems which can be avoided by treating all commercial mobile service providers alike.

PCS illustrates the problems with creating separate regulatory classifications within commercial mobile service. If the Commission decided to regulate paging and cellular differently within commercial mobile service, how should PCS be regulated? Should PCS be regulated like its paging or cellular competitor? Should a separate class be created for PCS? What will happen when the next generation of commercial mobile service emerges? By creating regulatory classes within commercial mobile service, the Commission is setting the foundation for disparate treatment of similar entities analogous to the treatment of enhanced SMR and cellular, a problem Congress intended to eliminate.

In addition, the Commission has recognized that competition reduces the need for regulation. [78] The need for regulation is directly related to market power. [79] If there is no threat of monopoly power, the need for regulation is substantially reduced. The purpose of the legislation was to allow the Commission to deregulate but ensure that the Commission would have "authority to act

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[77] *Id.* (quoting *Notice of Proposed Rule Making*, 7 FCC Rcd. 5676, 5712 (1992)).

[78] *See In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services, *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308, 313-14, 334-38 (1979) ("*Competitive Carrier Notice*"); *First Report and Order*, 85 FCC 2d 1, 1-12, 31 (1980) ("*First Report*") (subsequent history omitted); *NPRM* at ¶¶ 61-63.

[79] 77 FCC 2d at 335; *NPRM* at ¶ 62.

in the event competition does not happen." [80] Unless it becomes clear that competitive market forces are not protecting consumers sufficiently, the Commission should forbear from regulation. [81]

B. Due to the Competitive Nature of Commercial Mobile Service, the Commission Should Forbear from Title II Regulation to the Greatest Extent Possible

As the Commission has recognized, Title II obligations were imposed at a time when "there were only monopoly providers of domestic telecommunications service." [82] Responding to changes in technology, services available, and the marketplace, the Commission has recognized that "open entry and competition often bring greater benefits to customers and society than traditional regulation." [83] As a result, the Commission attempted to forbear from Title II regulation in many instances. The U.S. Court of Appeals for the D.C. Circuit,

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[80] Markey Statement at 3.

[81] In this regard, one situation may have to be carved-out -- the proposed merger of AT&T, which is the dominant interexchange service provider, with McCaw, the largest cellular carrier. As BellSouth suggested in its Petition to Impose Conditions or Deny as Filed submitted November 1, 1993, if the Commission does not impose separate subsidiary and other requirements on the proposed merger of McCaw and AT&T, McCaw should be subjected to full Title II regulation for the reasons stated therein. In addition, for regulatory parity purposes, BellSouth has advocated that parties to the *MFJ* must be treated alike for regulatory purposes. *See* Petition at pp. 44-52.

[82] *NPRM* at ¶ 51. *See, e.g.*, 45 Cong. Rec. 5533 (1910) (statement of Rep. Bartlett) (indicating that telephone and telegraph companies were like other monopolies and should be regulated accordingly); 45 Cong. Rec. 5534 (1910) (statement of Rep. Underwood) (stating that the telephone and telegraph industry was monopolistic and should be regulated); *see also Competitive Carrier Rulemaking, Notice of Proposed Rulemaking*, 84 FCC 2d 445, 520-34 (1981) (Appendix B, "Definition of Common Carrier Common Law Background") (subsequent history omitted).

[83] *NPRM* at ¶ 51.

however, found that such forbearance, at least in the tariff area, was inconsistent with the Communications Act. [84]

New Section 332 makes clear that the Commission has the discretion to forbear from applying much of Title II to commercial mobile service providers. It also preempts state rate and entry regulation. Under the amended Act, the Commission may now forbear from imposing certain Title II sections if:

- enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- enforcement of such provision is not necessary for the protection of consumers; and
- specifying such provision is consistent with the public interest. [85]

BellSouth supports the Commission's tentative conclusion that "the level of competition in the commercial mobile services marketplace is sufficient to permit [it] to forbear from tariff regulation of the rates" pursuant to Sections 203, 204, 205, 211, and 214 of Title II. [86] As commercial mobile service ultimately will be highly competitive, enforcement of these Title II provisions is not necessary in order to ensure that the charges, practices, classifications, or regulations are just

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[84] *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied* 113 S. Ct. 3020 (1993).

[85] 47 U.S.C. § 332(c)(1)(A) (as amended); Conference Report at 490-91.

[86] *NPRM* at ¶ 62. BellSouth notes that Section 214, on its face, applies to communications by wire only. Thus, it would be inapplicable to radio services such as commercial mobile service. BellSouth supports the petition for rulemaking and subsequent comments submitted by CTIA, which the *NPRM* states will be incorporated into the record. *See* Cellular Telecommunications Industry Association (CTIA), Petition for Rulemaking, RM No. 8179, filed January 29, 1993; Letter from CTIA, to Gregory J. Vogt, Esq., Chief, Tariff Division (September 1, 1993).

and reasonable. Based on the number of licenses, commercial mobile service providers will not be in a position to exercise market power. [87]

In *Competitive Carrier*, the Commission determined that nondominant carriers -- those lacking market power -- were effectively precluded from charging discriminatory rates; if they did, consumers would move to other carriers. [88] Further, the Commission has acknowledged that tariff regulation in a competitive environment is actually "counterproductive" and "inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." [89] Thus, under the second and third prongs of the statutory test for forbearance, enforcement of such provisions is clearly not necessary for the protection of consumers and would be inconsistent with the public interest.

BellSouth also supports the Commission's decision that Title II regulation is unnecessary or inapplicable to commercial mobile service for Sections 210 (Franks and Passes), 212 (Interlocking Directorates), 213 (Valuation of Carrier Property), 215 (Transactions Relating to Services), 218 (Inquiries into Management), 219 (Annual or Other Reports), 220 (Depreciation Charges), 221 (Special

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[87] BellSouth notes, for example, that two licenses are awarded per market in cellular and seven licenses are apparently proposed per region in the PCS docket. *See, e.g.*, 47 C.F.R. § 22.902; *In re* Implementation of Section 309(j) of the Communications Act, *Notice of Proposed Rule Making*, Docket No. 93-253, October 12, 1993. Further, enhanced SMR services are flourishing (*e.g.*, Nextel and Dialpage).

[88] *Competitive Carrier Notice*, 77 FCC 2d at 334-38; *First Report*, 85 FCC 2d at 31.

[89] *Tariff Filing Requirements for Interstate Common Carriers, Report and Order*, 7 FCC Rcd. 8072, 8073, 8079 (1992).

Provisions for Telephone Companies), 222 (Competition Among Record Carriers), and 224 (Pole Attachments).

C. All Commercial Mobile Service Providers Should be Eligible to Provide Dispatch Service

All commercial mobile service providers should be eligible to provide dispatch service. Congress expressed a desire for the Commission "to decide whether all common carriers should be able to provide dispatch service." [90] Section 332(c)(2) expressly authorizes the Commission to eliminate this prohibition should the Commission determine that its elimination would serve the public interest. [91]

Congress recognized that certain private carriers currently providing dispatch service will be characterized as commercial mobile service providers under the new regulatory scheme. [92] Congress grandfathered these carriers, however, to allow them to continue providing dispatch service. Allowing only formerly private carriers to provide commercial mobile dispatch service, however, would create the disparate treatment of like entities that Congress sought to eliminate.

Further, allowing all commercial mobile service providers to provide dispatch service will benefit customers by increasing competition. As stated above, the Commission has determined that competition is in the public interest

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[90] Conference Report at 492 (discussing House bill); House Report at 261.

[91] 47 U.S.C. § 332(c)(2) (as amended).

[92] Conference Report at 492. *See also* 47 U.S.C. § 332(c)(2) (as amended).

because it makes licensees more responsive to subscribers. [93] Competition, as a general proposition, also results in lower prices.

Thus, based on the foregoing, BellSouth asserts that all common carriers should be authorized to provide dispatch service in order to promote regulatory parity. [94]

D. Regulatory Parity Requires Removal of the Prohibition on Wireline Entry into SMR

When the SMR service was established in 1974, separate frequency blocks were allocated for SMRs and cellular systems. [95] Eligibility for SMRs was limited to non-wireline telephone companies and eligibility for cellular was limited to wireline telephone companies. While non-wirelines were originally prohibited from holding cellular licenses, this prohibition was removed in 1975. [96]

In light of the Budget Act's amendment of Section 332, the prohibition of wireline entry into SMR service is clearly unlawful and must be eliminated. The House made clear that the Commission must:

> review its rules affecting private land mobile services and . . . issue such changes as may be necessary to achieve regulatory parity. . . . Current commission policy prohibits common carriers from being licensed to offer Specialized Mobile Radio service. The Committee encourages the Commission to re-examine this restriction in light of the enactment of this section

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[93] *Tariff Filing Requirements*, 7 FCC Rcd. at 8079.

[94] To carry this out, the Commission would have to amend its rules to eliminate the restriction on common carrier provision of dispatch services implemented in response to former Section 332. *See* 47 C.F.R. § 22.519(a). *Compare* 47 U.S.C. § 332(c)(2) (as amended) *with* 47 U.S.C. § 332(c)(2) (previous version).

[95] *See supra* note 33.

[96] 51 FCC 2d at 953.

> to determine the extent to which such a restriction is in the public interest. [97]

In this regard, the Commission has already acknowledged that removal of the prohibition:

> would create to the maximum extent possible, an unregulated, competitive market place environment for the development of telecommunications by eliminating unnecessary regulations and policies. . . .
>
> . . .
>
> will enhance business opportunities for small wire line telephone carriers as well as large ones and will provide competition for both small and large SMR licensees. Such competition would increase the benefits and improve service to the public. . . .
>
> . . .
>
> would allow further entry into the SMR market and would provide more efficient service to the public by increasing competition. [98]

BellSouth has previously shown that the Commission cannot lawfully maintain the wireline SMR ineligibility rules. [99] Congress has now required that similar services be subject to the same regulation. There is no longer any plausible distinction between SMR service and Part 22 services that are functionally equivalent. Accordingly, the Commission should declare that the amendment of Section 332 eliminated any reason that might conceivably have existed for

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[97] House Report at 262.

[98] *In re* Amendment of Part 90, *Notice of Proposed Rule Making*, 51 Fed. Reg. 2910, 2911 (Jan. 22, 1986). Despite this language, the Commission terminated the proceeding without removing the prohibition. 7 FCC Rcd. 4398 (1992).

[99] *See* Comments of BellSouth Corporation, *et al.* in PR Docket 93-144, filed July 19, 1993, and in PR Docket 92-235, filed May 28, 1993.

this exclusionary rule, to the extent the SMR continues to exist as a licensing form.

E. Equal Access

Absent a removal of current equal access requirements imposed on the RBOCs in providing mobile service, BellSouth believes that these obligations should be applied to all commercial mobile service providers equally. [100] Imposing equal access requirements in such an environment will enhance competition. Thus, either a total elimination or universal requirement of equal access is required to achieve competitive parity from a regulatory perspective.

V. REGULATION OF INTERCONNECTION

A. The Right of Commercial Mobile Service Providers to Interconnection

In Section 332(c)(1)(B), Congress made clear Section 201 gives the Commission the authority to order a common carrier "to establish physical connections" to "any person providing commercial mobile service," upon "reasonable request." [101] The statute states that this does not change a common carrier's obligation to provide interconnection; it simply clarifies that "the Commission is required to respond to such a request." [102]

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[100] BellSouth notes that a petition for rulemaking is currently pending before the Commission on this issue. *See* MCI Telecommunications Corporation, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, RM-8012, filed June 2, 1992.

[101] 47 U.S.C. § 332(c)(1)(B) (as amended), 201.

[102] 47 U.S.C. § 332(c)(1)(B) (as amended).

BellSouth submits that the Commission is obligated to evaluate each case on its merits. Whether a request by a commercial mobile service provider for a particular form of interconnection is "reasonable" will depend on the facts of each case -- the mobile service provider's technical and service requirements, the common carrier's ability to provide the needed connection, the suitability of the particular form of interconnection, and the type of interconnection provided to others for similar mobile services. Also highly relevant would be the existence of alternative sources and forms of interconnection: A demand for interconnection might be deemed unreasonable if the equivalent were readily available from another source. Another relevant factor would be whether the company is demanding interconnection from a competitor: The Commission might conclude that the demand for interconnection is unreasonable because it would lessen facilities-based competition. It would thus be unwise to adopt sweeping generalizations about the nature of the interconnection that a common carrier must provide.

Common carriers vary widely in their ability to provide interconnection. Local exchange telephone companies and facilities-based interexchange carriers should clearly be under a different type of obligation to provide interconnection than long-distance resellers. Moreover, every commercial mobile service provider is to be "treated as a common carrier" for purposes of Section 201. [109] There is no indication in the statute, however, that SMRs or cellular licensees that are treated as common carriers, by virtue of their classification as commercial mobile service providers, are obligated to provide interconnection to other

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[109] 47 U.S.C. § 332(c)(1)(A) (as amended).

commercial mobile service providers on the same basis as telephone companies. [104] Therefore, no blanket interconnection obligations should be imposed on commercial mobile service providers.

Finally, it should be noted that Section 201 imposes an interconnection obligation only on common carriers providing interstate service. It does not affect purely intrastate service providers, and does not impose any obligation on the operators of non-common carrier networks.

B. State Regulation of Interconnection Rates

Based on the current state of telecommunications, it is not necessary to preempt state and local regulation with respect to interconnection rates. Fifty-one public utilities commissions currently are available, if necessary, for resolution of interconnection issues, in addition to the FCC. It would be unwise, as a matter of public policy, to attempt to preempt state utility commissions of jurisdiction without good reason.

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[104] The Commission appears never to have formally addressed the extent to which common carriers in competitive fields without an essential facility are obligated to provide interconnection to competitors. It is possible that no demands for such interconnection have ever been made. Thus, the *NPRM*, like prior FCC decisions, focuses on the obligation of telephone companies to provide interconnection to others.

CONCLUSION

For the foregoing reasons, BellSouth submits that the public interest would be served by adoption of its proposals set forth above.

Respectfully submitted,

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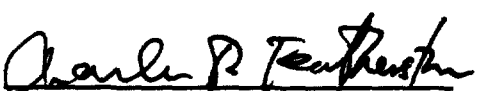
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